IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 240

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Petitioners,

vs.

JEWEL TEA COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

GEORGE B. CHRISTENSEN,
FRED H. DAUGHERTY,
38 South Dearborn Street,
Chicago, Illinois 60603,

THEODORE A. GROENKE,
SAMUEL WEISBARD,
111 West Monroe Street,
Chicago, Illinois 60603,
Attorneys for Respondent.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

AUTHORITIES CITED.

Cases.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 240.

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,
Petitioners,

vs.

JEWEL TEA COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

Correctly stated in the Petition, except that this Court's original denial of certiorari is reported in 362 U. S. 936, not 361 U. S.

The opinion of the Court of Appeals, not reported when the Petition was filed, now appears at 331 F. 2d 547.

QUESTIONS PRESENTED.

The questions presented by the record are not the questions posed in the Petition and the brief of *amicus*, both of which incorrectly state the facts and the holding below.

There is no issue as to the right of unions to bargain on an area-industry wide basis as to hours of work. The Court of Appeals assumes and preserves that right. Petitioners, outside of court, so recognize. Since the Petition was filed, they have announced publicly that, regardless of the outcome of the case, their members cannot be forced to work at night unless they wish to; that, in fact, they will not do so and that the unions have the right, and will continue, to bargain over *working hours*. See Appendix A hereto ("Chicago Butchers Will Not Work Nights Whatever Top Court Rules"). This effectively disposes of the exaggerated contention (Pet. p. 15) that the Court of Appeals decision means that "employees can have no say * * * in determining the parts of the day or the days of the week that they shall work * * *." The announcement reduces the Petition to proper focus and shows it to be, despite its complexity, a frivolous imposition on a burdened court, for the unions themselves recognize that *working hours*, about which the entire Petition revolves, actually are not an issue.

Thus the questions presented by the record are:

1. May meat market operators and unions representing all of the butchers in a large trading area go beyond joint bargaining as to hours of work and contract and combine to prevent any market operator therein from selling fresh meat on a self-service basis save within hours prescribed by the combination?

2. Is a contract which wholly restrains competition in the sale of fresh meat to hours which, by independent survey, are inconvenient to 34% of the public, which interferes with and lessens competition between fresh meat and other meat and food products, and which has no tendency to promote or strengthen

competition either as between products or as between vendors of meat, a reasonable restraint of trade?

3. If a restraint of trade, illegal under the Sherman Act, is embodied in a collectively bargained contract, has Congress committed primary jurisdiction to the General Counsel of the National Labor Relations Board, or to the Board, to determine whether one injured thereby may institute an action under the Clayton Act?

STATUTES INVOLVED.

Provisions of the Clayton and National Labor Relations Acts pertinent to Petitioners' contentions are omitted from the Petition. They are:

1. *The Clayton Act* (38 Stat. 731, 15 U. S. C. § 15):

> "4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. *The Clayton Act* (38 Stat. 737, 15 U. S. C. § 26):

> "16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * *."

3. *National Labor Relations Act, as amended* (61 Stat. 139, 29 U. S. C. § 153(d)):

> "(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

STATEMENT.

This is an action to strike down a complete restraint on the purchase of fresh meat from self-service counters in Chicago food stores after the hour of 6:00 p.m.

Commercial development of modern refrigeration and plastic wrapping materials make it possible to prepare meat in advance, wrap it in transparent wrappers, and lodge it in open freezer cases where buyers may select the meat they desire in the evening even though the butchers who have prepared the meat are not on duty. Such evening sales are commonplace throughout the nation. However, notwithstanding public demand in the Chicago area for access to meat in the evenings, defendant unions, combining with market operators other than the plaintiff, have entered into, and enforced, a contract preventing any sale of fresh meat, *i.e.*, ending all competition in the sale of fresh meat, after the hour of 6:00 p.m. This is in the face of the fact that supermarkets in the area are open one or more evenings a week for the sale of foods generally, including competitive poultry and meat products other than fresh red meat.

Competition between fresh meat and other foods is thus interfered with in one of the largest consuming markets in the nation. The repercussive effects of the restraint are felt by livestock producers. The National Livestock Feeders Association intervened in the Court of Appeals in opposition to the restriction, pointing out the adverse effect upon members of the Association (331 F. 2d 547).

Involved is not only competition between fresh meat and other food products but between two systems for retail sale of meat, *i.e.*, between the traditional *service* markets (contract at App. 28) and the *self-service* markets above described (contract at App. 42). There are basic differ-

ences between the two systems of sale, viz., a service market cannot operate at all without butchers on duty; a self-service market, for limited hours, can do so, and Jewel so operates successfully in Indiana; a self-service market requires more space and more investment than a service market.

The restraint works as follows:

A Chicago citizen who comes to a Jewel food store after 6:00 p.m. will find the store open, with groceries available and the cashier on duty to accept payments for merchandise. He will see a plentiful supply of wrapped, fresh meat in the self-service cases. The butchers have completed their work on it: they have cut, trimmed, packaged, priced it and placed it in the cases. There it is, waiting a shopper's selection. Under unimpaired competitive opportunities, the shopper would do so, as is demonstrated throughout most of the nation.

The barrier between the shopper and the meat in Chicago, which Petitioners' principal officer admits stands out "like a sore thumb" (App. 115), is a sheet of butcher paper with which the "red meat" must be covered at 6:00 p.m., but which is omitted from fresh poultry and other items in the self-service cases within the jurisdiction of the combination but to such products, for reasons of outside (delicatessen) competition (App. 600), it permits access.

Although the markets theoretically may be open 9 hours for 6 days a week (54 hours), the fact is that for a substantial segment of the public the 54 hours are illusory. Because the family auto is not readily available for shopping in many working families on Mondays through Fridays, and for similar reasons, it is impossible for them to purchase fresh meat at any time save on Saturdays. Because of the restraint, 19% of Chicago area families have

been compelled to purchase unsatisfactory substitutes for fresh meat, 34% have been seriously inconvenienced (Pl. Ex. 17).

The restraining provision did not come into existence until 1947. It reads:

> "Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above. In those stores in which the grocery departments remain open after 6:00 p.m. only the following products may be sold after 6:00 p.m. [then follows a list of semi-prepared meat products and fish and poultry items which, while within the 'jurisdiction' of unions, have been exempted from the restraint as competition outside the combination has made itself felt. App. 600]." (R. 23, 38.)

The fact is that *hours of work* are not controlled by the "Market Operating Hours" Article but by the "Working Hours" Article which provides:

> "Basic Workday. Eight (8) hours shall constitute the basic workday. Work shall begin at 9:00 a.m. and shall cease at 6:00 p.m. * * *" (App. 49.)

In addition, provision is made for over-time work between 8:00 and 9:00 a.m. and 6:00 and 9:00 p.m. behind locked doors in self-service markets (App. 50) and after 6:00 p.m. without limitation in service markets (App. 36). The basic work week in each instance is 40 hours, not the 54 hours during which selling is permitted.

Respondent, alleging that the limitation on hours of competition was a violation of the Sherman Act, sued for a declaratory judgment, treble damages, and injunctive relief. Petitioners moved to dismiss. The complaint was held valid by the District Court, and on appeal by the Seventh Court of Appeals in 274 F. 2d 217, Pet. p. 12a. That opinion remains important because it was specifically

re-adopted (Pet. 5a) in the second Court of Appeals opinion. Petitioners sought certiorari from the first opinion upon the "primary jurisdiction" point now urged and generally advanced the same arguments as to an asserted, indirect labor purpose now again repeated (Pet. in No. 732, Oct. Term 1959); certiorari was denied March 28, 1960 (362 U. S. 936).

EVIDENCE.

Upon trial after remand, the contracts were proved. Plaintiff also proved that during the 1957 negotiations which led to this suit, Associated Food Retailers steadily maintained the position that hours of sale must be regulated, that if the ban was to be relaxed at all, it could be only for the second year of a two year contract term, and then only for one evening a week and upon the proviso that at least one butcher be on duty (App. 396). In other words, Associated desired continued artificial regulation of retail competition.

The proof showed that prior to suit the unions' principal officer, Emmet Kelly, said the ban was justified as a means of resistance to chain stores who wanted "to squeeze the small operators to death," whereas "true American ideals called for a free enterprise system wherein our members should have rightful opportunity of some day owning their own business" (App. 95)[1]; he thought the night sale of meat by chains might somehow interfere with the possibility of butchers becoming market operators (App. 96). Another official of Petitioners' admitted that the purpose of the restriction was "to protect the independent fellow" (App. 557). The fact that *working hours* were covered in other portions of the contract and such evidence as the

1. A self-service operation requires more floor space and costlier equipment than does the traditional service market and hence is more difficult to initiate (App. 158).

foregoing show the object of the conspiracy or combination, as found by the Court of Appeals (Pet. 5a), was "to prevent commercial development."

Petitioners argued in the District Court (and in the Court of Appeals) that the limitation upon sales hours was within the antitrust exemption because its purpose was to maintain industry conditions "deemed by the union relevant to the employees' working welfare." The District Court held that since the restraint on industry-wide hours of sale arose from labor's "desire to protect its right not to work at night" (App. 672) it was within the labor exemption. However, the Court of Appeals held that setting marketing hours is not a condition of employment. It emphasized the distinction between working hours and market selling hours and held that while unions are exempt from the antitrust laws when bargaining concerning the former (or workloads), they are not exempt when they enter into agreements imposing industry-wide restraints upon competing employers on other subjects.

Both the Petition and the Brief *amicus* proceed upon the seriously erroneous premise that various expressions of fact or opinion in the District Court's Memorandum were "accepted" or were not "disturbed" by the Court of Appeals. Although the Court of Appeals did not deal with the District Court's Findings and Conclusions piecemeal, it reversed the District Court on the facts and held, squarely contrary to the District Court, that the evidence "*sustains the material allegations of the complaint.*" It reiterated its first opinion as the controlling law and applied that law to the evidence upon remand (Pet. p. 5a). It then squarely held that "*The evidence on remand supports the allegations of the* complaint charging that the * * * defendants, effectuated through a contract, an unreasonable restraint of trade," and that the complaint was supported by "convincing evidence." It thus wholly swept.

aside the District Court's erroneous conclusions that the restraint was solely for labor objectives, that self-service markets could not be operated at any time without butchers on duty, and that the restraint was reasonable.

REASONS FOR DENIAL OF THE WRIT.

The thrust of the Petition and the Brief amicus is that this case should be used as a vehicle for the exposition of new rules governing the interplay of the antitrust and labor laws. However,

1. The instant opinion promulgates no new or novel doctrine that needs correction. It simply applies existing law to particular facts of the case, holding that where the unions have fully bargained and agreed as to normal hours of work (and as to premium rates and other conditions of work outside of normal hours), they cannot go on and enter into agreements with employers to control the marketing of meat in Chicago because, in the opinion of union officials, such control would serve the "best interests" of the union members. This is precisely the evil condemned in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, where unions believed market control would result in higher pay and more work for their members and thus was in their interest. Basically the Petition, no matter how many collateral points be raised, is an effort to overturn *Allen Bradley*.[2]

2. That the aim of the Petition and the brief *amicus* is to overturn *Allen Bradley* is indirectly confessed by the argument in the footnote at page 3 of the brief "against too ready a reliance" on *Allen Bradley*. Counsel attempt to distinguish *Allen Bradley* on the ground it was concerned with "product competition", whereas, so counsel assert, the instant case involves a matter of bargaining over "hours" and "other terms and conditions of employment." As we have pointed out, the Court of Appeals held this case does not involve a matter of bargaining over hours or terms of employment and Appendix A hereto shows that the unions realize they still can bargain over hours and wages. Of

2. The union contention is that the "antitrust" exemption should extend beyond the activities mentioned in Section 20 of the Clayton Act to any matter affecting the welfare of employees. As the Court of Appeals pointed out in its first opinion, nearly anything that goes on in business, as, for example, prices, sales policies, territorial limits, etc., affect the welfare of all its employees (and stockholders). What petitioners are asking, therefore, is that the Court take the case to decide whether the "labor exemption" should be broadened to exempt restraints other than those directly concerned with terms and conditions of employment. The exemption is not a blanket one nor may it properly be expanded or contracted by the courts. It is a limited statutory exemption as this Court repeatedly has held. The brief *amicus* conceals that this Court did not hold in *United States* v. *Hutcheson*, 312 U. S. 219 (1941), that the antitrust laws are unconcerned with the "rightness or wrongness" of *anything* a union may do, but are unconcerned only where the particular union activities involved are *those specified in Section 20 of the Clayton Act* (or Section 13 of Norris-LaGuardia). What the Court actually said was (312 U. S. at 232):

> "* * * the licit and illicit *under § 20* are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." (Emphasis supplied.)

---

equal significance, the record shows that when Jewel asked the unions upon what terms and conditions they would agree to a change of the night restriction if all other terms of the contract were agreeable, they responded that they would state no position unless and until all of the industry, all markets, big, small, wherever situated and however equipped, agreed to stay open 24 (record erroneously reads 20) hours a day 7 days a week (App. 535-7). The proposition was too absurd for serious consideration but it demonstrated that the unions would not actually bargain over hours and insisted upon regulating the hours of sales competition within the industry whether the regulated period be short or forcefully be made so long that no one could comply.

See also *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 413 (1947), which clearly holds that although repeated efforts have been made to have Congress take trade unions from under the Sherman law, such efforts have failed and that only "specifically enumerated practices of labor unions" are exempt therefrom.

3. Section 20 of the Clayton Act (as does Section 13 of Norris-LaGuardia) exempts certain activities of unions in endeavoring to arrange "*terms and conditions of employment.*" A restraint on hours of competition between merchants is not such an activity. Nor is such a restraint a labor dispute within the meaning of Section 13 of the Norris-LaGuardia Act. If the exemption is to be broadened to permit unions to combine with businesses to impose marketing restraints on the theory that higher wages or profits or less onerous work may result therefrom, or on petitioners' theory that the antitrust exemption should be made elastic because conditions are not "static" (Br. *Amicus* p. 5), the plea should be made to the Congress, not to the Court.

On the facts of this record and because it is barren of a scintilla of evidence that the market hours restriction has any tendency to promote competition, the Court of Appeals' decision is clearly in accord with prior decisions of this Court. As the Court of Appeals held, the market hours provision, in the context of the instant case, is but a naked restraint of trade obnoxious to the antitrust laws just as were the employer-union agreements in *Allen Bradley*.

Petitioners argue they are wholly free from antitrust restraint unless they conspire to aid and abet a conspiracy initiated only by employers. No case has ever so held. Petitioners assert they were the aggressors who brought about the restraint in its present form. Even if the latter

contention had a factual basis it is still immaterial, for the identical argument that union aggression in a business-labor combination resulted in antitrust exemption was rejected in *Allen Bradley*. There the union argued and District Court's approved finding stated "* * * the union was the actuating party instead of the manufacturers or employers" (41 F. Supp. at 750). The holding in *Allen Bradley* makes it clear that it is immaterial whether a restraint is originated and perpetuated by a union rather than by an employer. Whether the employers "surrender", as in *Allen Bradley*, or joyously embrace the restraint is irrelevant.

Actually petitioners talk out of both sides of their mouths —their lawyers say the unions were the aggressors, but Emmett Kelly, Secretary of the dominant Local, testified, "We accepted the majority of industry proposal" (App. 139), and agreed that he protested vigorously at placards in plaintiff's stores which placed the "onus" of the restraint on the union (App. 110). He says the restraint or closing at 6:00 p.m. is "Pursuant to an industry-union agreement" (App. 110). Since such an agreement on such a subject is illegal, it is not material who was the initiator.

If Petitioners' contentions were accepted, unions could, with impunity, initiate price fixing agreements and other antitrust violations whenever they considered the interests of their members would be served thereby. There would be no respect in which competition could be preserved against union initiated restraints—price fixing, for example, could readily be justified on the premise that increased prices would result in wage increases.

Petitioners overstate the holding of the Court of Appeals as to the function of the proprietor of a business with respect to the hours he will deal with the public. The Court did not hold, as the Petition would have it, that employees can have no say in determining the parts of the day

or the days of the week they shall work, nor did it hold that "determination" of the hours of employment for the butchers to supply meat to customers is the prerogative of the employer. It held only that the "*furnishing* of advantageous hours of employment for the butcher to supply meat to customers" was the prerogative of the employer. As the unions have announced in Appendix A hereto, even though the employer is free to furnish suitable hours, no one can force employees to accept what is furnished. The effect of the Court of Appeals' holding in the instant case is that, since every legitimate union objective had been attained by the provision regulating hours of work, or could be attained by additional provisions regulating workloads if such were deemed necessary, the industry-wide regulation of marketing practices was a simple restraint of trade and not a labor dispute. The cases relied upon in the petition as allegedly showing that unions have been permitted to widen the so-called exemption beyond its statutory provisions are inapplicable because, unlike the instant case, they clearly involve labor disputes and bargaining on terms and conditions of employment.

In *Telegraphers* v. *Chicago & N. W. Ry.*, 362 U. S. 330 (1960), the unions did not object to the railroad's decision to close stations; the bargaining was only over whether, if the stations were closed, the employees would nevertheless retain their jobs or upon what terms employees might be discharged. In *United States* v. *International Hod Carriers*, 313 U. S. 539 (1941) and *United States* v. *American Federation of Musicians*, 318 U. S. 741 (1953) the controversies were not over an employer's right to use labor-saving machinery, but over whether unions could bargain to require employers to have employees present even though the labor-saving machinery was being used, and, even though, in the opinion of the employers, the presence of employees was not necessary.

In *California Sportswear*, 54 FTC 835 (1956), the establishment of terms upon which contractors would work was construed by the Federal Trade Commission not as a restraint upon competition but, in effect, the fixing by labor and management of wages and terms and conditions of employment. Since the so-called contractors were deemed, in effect, employees, or substitutes for employees, their rates could be regulated in order to prevent employers from evading their commitments concerning union conditions of employment. Such regulation, unlike the restriction herein, was directly and intimately connected with, and therefore necessary for the protection of, union working conditions. Accordingly, *California Sportswear* is nothing more than an application of *Oliver* and *Lake Valley Farm*, which the Court of Appeals considered and properly distinguished in its first opinion.

THIS CASE IS WHOLLY DIFFERENT FROM UNITED MINE WORKERS v. PENNINGTON, NO. 48 THIS TERM.

Petitioners suggest that certiorari should be granted here because certiorari was granted in the *Pennington* case; that with the two cases before it the Court could explore the entire field of the responsibility of labor unions under the anti-trust laws. The only similarity between this case and *Pennington* is that both are brought under the anti-trust laws. The issues are not companion or related issues but are vastly different.

The questions presented in *Pennington* are whether a union may be held liable under the anti-trust laws where, with numerous employers, it has established wage rates at levels above the ability of some employers to pay, and whether union-employer co-operation in securing Governmental minimum wage rate determinations under the Walsh-Healey Act may be treated as violations of the

Sherman Act. Since the labor exemption as phrased either in Section 20 of the Clayton Act or Section 13 of the Norris-LaGuardia Act extends to activities or controversies "concerning terms and [or] conditions of employment," it is apparent that with wages the basic question, a colorable conflict existed between the Court of Appeals decision in *Pennington* and the decisions of this Court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940) and *United States* v. *Hutcheson*, 312 U. S. 219 (1941). Moreover, insofar as the Court of Appeals decision in *Pennington* was based upon efforts to secure Governmental action under the Walsh-Healey Act, a facet of *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), was involved.

No such issues, or any kindred to them, are remotely involved in this case, in which the question was whether unions and employers may go beyond joint bargaining as to hours of employment and enter into a combination to restrain hours of sales competition in an entire industry.

THERE IS NO PROPER ISSUE OF "PRIMARY JURISDICTION."

The principal contention of the brief *amicus* is that by adopting the National Labor Relations Act, Congress committed to the National Labor Relations Board authority to decide whether any contract restraining trade, to which unions were parties, violated the Sherman Act. This contention is strictly one of law, and, if possessed of any validity, was as valid in the previous Petition in this case (No. 732, October Term 1959) where it was the *sole* "Question Presented," as in this one. It is difficult to believe the Court would have denied certiorari in 1960 and remitted the case to a protracted trial if it believed there was question of primary jurisdiction worthy of certiorari.

The point is devoid of validity, and not a scrap of legislative history is, or can be, cited in support of it. This is fatal to the point (*United States* v. *Borden*, 308 U. S. 188, 206 (1939). Public policy authorizes and supports private anti-trust actions as an ancillary method of maintaining a free and competitive economy, and that policy is not to be weakened by judicial construction. *Lawlor* v. *National Screen Service*, 349 U. S. 322, 328, 329 (1955); *Flinkote Company* v. *Lysfjord*, 246 F. 2d 368, 398 (9th Cir., 1957), cert. den. 355 U. S. 835 (1957); *Klor's Inc.* v. *Broadway-Hale Stores*, 255 F. 2d 214, 217 (9th Cir., 1958), revs'd other points 359 U. S. 207 (1959); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 365 (9th Cir. 1955).

The doctrine of "primary jurisdiction" in the Interstate Commerce Commission or the Maritime Commission to pass upon anti-trust deviations in regulated businesses which are permitted certain monopolistic practices, is without relevance to the food distribution business which is fiercely competitive and should be kept so (*United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 79 (7th Cir., 1949); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 137 F. 2d 459 (5th Cir., 1943).

Moreover, the contention that primary jurisdiction is in the Labor Board is not even plausible, for, because of the unique structure of that agency with division of function between the General Counsel and the Board itself, the supposed complaint ("charge") of one allegedly injured by an anti-trust violation would not go to the Labor Board but merely to its General Counsel, who, under Section 3(d) of the Labor Act, would exercise final, unappealable jurisdiction and, supposedly, if one endeavors to import some logic into the brief *amicus*, decide whether a citizen could maintain a private antitrust action. And, to make the matter even more grotesque, the General Counsel is not authorized to receive "charges" of antitrust violations but

only "charges" of unfair labor practices. The contention is too farfetched to deserve serious consideration.

Where questions involving interplay of the Sherman Act and statutes concerning rights of unions have been involved, the courts heretofore have exercised jurisdiction to decide them, for jurisdiction to entertain antitrust actions rests solely with the United States District Courts and the statutes expressly authorize private actions such as the one at bar. Such cases as *United States* v. *Hutcheson*, 312 U. S. 219 (1941), *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797 (1945), and *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395 (1947), are in point. *International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283 (1959), in which conflict between the Ohio antitrust laws and the National Labor Relations Act was resolved, again demonstrates that the courts are the place for determination of such conflicts if it be assumed they exist.

Because there is no genuine issue of primary jurisdiction, petitioners have been forced to rely on inapplicable pre-emption cases which raise the issue of the paramountcy of national labor policy over state labor policy. This paramountcy is equally true as to the antitrust responsibilities of unions under Federal law. *International Brotherhood of Teamsters, etc.* v. *Oliver*, 358 U. S. 283 (1959), made it clear that "Federal law sets some outside limits (not contended to be exceeded [t]here) on what their agreement may provide, see *Allen Bradley Co.* v. *Local Union*, 325 U. S. 797; cf. *United States* v. *Employing Plasterers Ass'n*, 347 U. S. 186, 190." Cases concerning the scope of bargaining *on subjects not trenching upon antitrust domain*, such as *N. L. R. B.* v. *American National Ins. Co.*, 343 U. S. 395; *N. L. R. B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342; *N. L. R. B.* v. *Insurance Agents' International Union*, 361 U. S. 477; *Fibreboard*

Paper Products Corp. v. *N. L. R. B.*, No. 14, October Term 1964, referred to by Petitioners or *amicus*, are not relevant to the present issue. They furnish no reason for certiorari in an anti-trust case for it is axiomatic that, however wide the scope of bargaining, it may not embrace anti-trust violations beyond the limited labor exemption (*Oliver, supra*). Counsel forget that courts, like the Labor Board, may not pursue "the policies of the Labor Relations Act so single-mindedly [as to] wholly ignore other and equally important Congressional objectives" (*Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 47 (1942)).

OTHER QUESTIONS.

We have briefly discussed all questions by which petitioners or *amicus* seek to assert some allegedly novel or important question of law or policy. The other contentions raised by petitioners do not purport to raise such matter; they simply assert the Court of Appeals erred in its assessment of the facts of the case[3] and do not furnish reasons for certiorari.

Respectfully submitted,

GEORGE B. CHRISTENSEN,
FRED H. DAUGHERTY,
38 South Dearborn Street,
Chicago, Illinois 60603,

THEODORE A. GROENKE,
SAMUEL WEISBARD,
111 West Monroe Street,
Chicago, Illinois 60603,
Attorneys for Respondent.

August 19, 1964.

---

3. For example, petitioners complain of the Court of Appeals' handling of the injury and damage questions and would ask this Court to grant certiorari so that the Court of Appeals might be directed to return the case to the District Court for a detailed assessment of the facts in this regard. But this is precisely what the Court of Appeals did, so that it is obvious that petitioners' contention cannot be a valid ground for obtaining certiorari. The Court of Appeals' statement that "by detailed and persuasive evidence plaintiff has shown it has been injured," was simply an affirmation of Jewel's standing to maintain the action, certainly for an injunction, and for such monetary relief as a detailed assessment of the evidence might warrant.

APPENDIX A.

SUPERMARKET NEWS, MONDAY, JULY 27, 1964

Chicago Butchers Will Not Work Nights Whatever Top Court Rules

CHICAGO. — Union butchers will still refuse to work after 6 p.m. in Chicago stores even if the U. S. Supreme Court affirms a lower-court invalidation of a collective-bargaining-agreement ban on the sale of fresh meat here after that hour.

This was told to Supermarket News last week by Emmett Kelly, vice-president of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and director of its Chicago Division.

The curfew was ruled illegal in U. S. Court of Appeals here in May by Jewel Tea Co., and the union, joined by the AFL-CIO, is bringing the matter before the Supreme Court, which reconvenes in October.

Jewel Tea's attorney, George Christensen, told Supermarket News last week that, if the high court denies the union's appeal, Jewel will begin selling meat after 6 p.m., which it hasn't done since 1947.

He added, "My understanding is that, after the Circuit Court of Appeals decision, quite a few small independents, particularly in the southern part of the (Cook) county, began to sell meat after hours."

This was true, said Mr. Kelly, but not too many and not for long. Those that did were contacted by union business agents, and after-hours sales were quickly abandoned. There are areas in the southern part of the county, he added, that are permitted to operate after 6 p.m. by union contract.

Mr. Kelly said, "We'll abide by the decision of the court," should the plea be denied. "All employers will then have the right to sell meat any time they please."

He added, however, it would be sold after 6 p.m. "without the benefit of any butchers being on duty. Butchers won't work without the sanction of the union.

"We have a bargaining issue—the right to sit down and bargain whether or not we will work at all and under what conditions.

"And if they attempt to sell without the benefit of union help, then no one else could handle the meat, including the clerks, as this would be a violation of our contract."

If the decision went against the union, he explained, the meat department could be open to the public seven days a week, around-the-clock. But he said no one could straighten out, restack, do anything in cutting and servicing of meat after 6 p.m. Departments would be a shambles, he predicted.

Locals involved are 189, 262, 320, 546, 547, 571 and 638. The AFL-CIO, said Mr. Kelly, is entering the case as a friend of the court for the second such time in its history.